IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON & NEWMAN,

Plaintiff,

v.

FLORENCE ZSCHACH, et al.

Defendants.

Case No. 94CVH08-5929

Judge Sheward

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within action came on for trial to the Court on November 6 and 7, 1995, on the Plaintiff's Complaint and the Counterclaim of Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee. At the conclusion of the trial the Court rendered its decision from the bench in favor of Plaintiff on the Complaint and against said Defendants on their Counterclaim. Counsel for Defendants Marylou Zschach, Trustee and Florence Zschach, Trustee, requested findings of fact and conclusions of law in accordance with Civ.R. 52, and the Court requested that counsel for Plaintiff prepare same. The following Findings of Fact and Conclusions of Law are respectfully submitted in response to that request.

FINDINGS OF FACT

1. Robert E. Albright is an attorney at law, licensed to practice in the State of Ohio, and is a partner in the Plaintiff law firm, Lucas, Prendergast, Albright, Gibson & Newman (The "Lucas Law Firm").

2. Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, along with Defendant Margaret Ann Slone, Trustee, are the duly appointed and acting Trustees of the Trust created by Item 3 of the Last Will and Testament of Clara K. Wirthman, Deceased, Case No. 239389, Probate Court of Franklin County, Ohio (the "Trust"). (Defendants' Exhibit 4)

3. Among other provisions, the Trust provides in Item 5 of the Will:

> . . . Said trustee is hereby authorized to administer said trust in such manner as he reasonably deems most advantageous and beneficial to said trust; I hereby authorize said trustee to sell, transfer, lease (irrespective of the duration of the trust) or otherwise dispose of or deal with the trust corpus, or invest, or reinvest, the same, as if he were the absolute legal owner thereof, . . .

4. In early 1992, as a direct result of a telephone call from Defendant Marylou Zschach, Trustee, to Robert E. Albright, which occurred in December, 1991, Robert E. Albright met with Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee; and, as a result of that meeting, the Lucas Law Firm was retained to represent the interests of the Trust relative to the sale of a certain parcel of property owned by the Trust comprised of approximately 29.5 acres of land located at the northwest corner of Henderson Road and Sawmill Road in Franklin County, Ohio (the "Property").

5. Although there was no written fee agreement between the Lucas Law Firm and the Defendants, the fee agreement was not a contingent fee agreement and the

Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, agreed to pay the Lucas Law Firm for the legal services rendered.

6. Beginning in early March, 1992, and concluding in late September, 1993, the Lucas Law Firm provided legal services to the Trust which are generally described in the statement from the Lucas Law Firm to the Trust dated December 1, 1993, and admitted into evidence as Plaintiff's Exhibit 1. The legal services were provided for the benefit of the Trust and in accordance with the oral agreement between the Lucas Law Firm and Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee.

7. The legal services performed by the Lucas Law Firm were necessary to attempt to accomplish the interests of the Trust related to the sale of the Property; and the amount charged, $30,830.00 for legal services and an additional $63.84 for expenses advanced, totaling $30,893.84, is fair and reasonable.

8. In the summer of 1993, Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, retained new counsel, to wit: Michael E. Moritz and the law firm of Baker & Hostetler, with respect to the same matters for which the Lucas Law Firm had previously been retained, and, by letters dated September 23, 1993 (Plaintiff's Exhibit 42), terminated the services of the Lucas Law Firm.

9. On December 1, 1993, the Lucas Law Firm issued its statement for services rendered and expenses advanced (Plaintiff's Exhibit 1) to the Clara K. Wirthman Trust and forwarded the statement to each of the Defendants, Marylou Zschach, Trustee, Florence Zschach,

Trustee, and Margaret Ann Slone, Trustee (Plaintiff's Exhibit 4).

10. No payment has been made to the Lucas Law Firm for the legal services rendered or the expenses advanced.

11. The Lucas Law Firm was not retained by Defendant Margaret Ann Slone.

12. The Defendants offered no credible testimony of any act of legal malpractice on the part of Robert E. Albright or the Lucas Law Firm.

13. Even if Defendants had offered evidence of an act of malpractice on the part of Robert E. Albright or the Lucas Law Firm, the Defendants offered no evidence that any act of Robert E. Albright or the Lucas Law Firm was the proximate cause of any damage to them or the Trust.

14. Even if Defendants had offered evidence of an act of malpractice by Robert E. Albright or the Lucas Law Firm, the Defendants offered no evidence of any damages suffered by them or the Trust.

15. The Defendants offered testimony of one expert witness, John J. Chester, who testified that it was his opinion that Robert E. Albright had committed an ethical violation during his representation of the Trust; however, this expert witness offered no testimony that Robert E. Albright or the Lucas Law Firm committed any act of malpractice. In addition, the testimony of this witness that it was his opinion that Robert E. Albright had committed an ethical violation was based on alleged facts (the testimony of a witness given in a deposition in a separate

case who was not called as a witness in this case) that are not in evidence in this case.

CONCLUSIONS OF LAW

1. The Lucas Law Firm is entitled to recover from the Trust, through Defendants Marylou Zschach, Trustee, Florence Zschach, Trustee, and Margaret Ann Slone, Trustee, the sum of $30,893.84, plus interest at the statutory rate of 10% per annum from December 1, 1993, and is entitled to a judgment in that amount. This conclusion is based upon the oral agreement between the Lucas Law Firm and Defendants Marylou Zschach, Trustee, and Florence Zschach, Trustee, and/or upon quantum meruit.

2. The liability of Defendant, Margaret Ann Slone, Trustee, is limited to the claims made against her as a nominal Trustee of the Trust; and she is entitled to a dismissal of any claims made against her personally.

3. The Lucas Law Firm and Robert E. Albright are entitled to a dismissal of the Counterclaims made against them as a result of the failure of Defendants to produce any credible evidence of any act of malpractice on the part of Robert E. Albright or the Lucas Law Firm; the failure of Defendants to produce any evidence that any act committed by Robert E. Albright or the Lucas Law Firm was the proximate cause of any damage suffered by Defendants or the Trust; and the failure of Defendants to produce any evidence of any damages suffered by Defendants or the Trust.

/s/ Sheward
RICHARD S. SHEWARD,
JUDGE

Copies to:

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